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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JAN 05 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition and certified the decision to the Administrative Appeals Office (AAO) for review. The AAO will withdraw the director's decision and approve the petition.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an assistant research professor at the [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

In response to the certified decision, the petitioner submits a brief from counsel and supporting exhibits, mostly duplicating prior submissions.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 27, 2010. In an accompanying statement, prior counsel stated:

> [The petitioner's] petition is based on his major achievements in the sciences in the specialized field of Biological Science with particular emphasis on prophylactic and therapeutic vaccines for cancer and infectious diseases. Cancer vaccine is a challenging line of research, with only 2.3% . . . of cancer vaccine clinical trials showing the modest improvement in this urgently demanded/unmet field. The major attempt in the field has been the use of various vaccination/immunotherapy methods. So far, the most approached methods have been, a) viral vector based vaccination, b) peptide-based vaccination, and c) non-viral genetic immunization. [The petitioner] is among the few investigators who have extensively examined all of these methods and been able to improve upon all of them.

The petitioner submitted copies of patent documents and other materials relating to his work. The existence of these patents is not presumptive evidence of eligibility. The petitioner must show the significance of the patented work. *See Matter of New York State Dept. of Transportation*, 22 I&N Dec. 221 n.7.

The petitioner submitted copies of eleven of his published scholarly articles, and evidence of the publication of a twelfth article. The petitioner also submitted printouts from the SCOPUS database [redacted] indicating that the database contained 500 citations of the petitioner's articles. More detailed SCOPUS printouts identified 72 of the citing articles. Seven of those 72 citations are self-citations by the petitioner and/or his co-authors.

The petitioner submitted several witness letters, many of them dating from June 2009 when another petition was pending on his behalf. [redacted], vice president of research and development [redacted] stated:

> During his post as [redacted] [the petitioner] produced three peer-reviewed manuscripts that were published in prestigious scientific journals. . . .
>
> In the scientific field, the first and last authors of published scientific works indicate the most significant contributions to the body of work. [The petitioner] was the first author for two of the publications, and senior author on the third. This indicates that he performed the most significant portion of the published work during his tenure at [redacted]

[redacted] stated:

> As his close collaborator, I am pleased that in less than 2 years, [the petitioner] has not only successfully established the [redacted] but also has brought cutting edge vaccination methods that have attracted many principle [sic] investigators [redacted] as well as external institutions and industries. Indeed, the three non-viral methods for "genetic vaccination" that he has invented or

> improved/established, in vivo electroporation, liposome based, and a novel targeted nanoparticle platform have resulted in two patent applications [and] several research collaborations . . . with major biotech and pharmaceutical companies. In fact, [the petitioner] has been the leader and main player in the development of the patent using this technology.

[redacted] stated that the petitioner "provides the driving force for the common enterprise" on which the petitioner and [redacted] collaborate, and that the petitioner "has developed the basic ideas behind our projects and should be considered the main author of our patents." [redacted] provided little information about the joint projects, except to state that they "deal[] with gene delivery and vaccination."

[redacted] stated:

> [The petitioner] has developed several new novel methods for vaccination either via new inventions/patents or by partnership with industry including a vaccine delivery platform from [redacted], an in vivo electroporation vaccine delivery from [redacted], adjuvanted oil vaccine delivery from [redacted] and a novel nanoparticle based vaccination platform that he has invented. [The petitioner] has been the driving force and mind behind all these efforts.

[redacted], called the petitioner "a collaborator" with that company, and stated that the petitioner "has successfully used our system in DNA vaccine experiments," and that the petitioner "is a prominent scientist in the cancer vaccine development field." [redacted] provided few details about the petitioner's work except to emphasize that it involved [redacted] "system."

[redacted] stated that he and the petitioner "enter[ed] into a partnership to jointly apply for an NIH grant to develop novel immunological reagents for monitoring cell mediated immune response." It is not clear that this joint effort had begun before [redacted] wrote this letter in June 2009. [redacted] attested to the petitioner's "expertise in the Immunology field" but provided no other details about his work.

[redacted], stated:

> [The petitioner] published the first report that showed the interleukin-10 feedback mechanism that regulates immune responses. This has essential applications in the design of protective vaccines. This publication in the Journal of Immunology has been cited more than 100 times. . . .

> He employs cutting edge techniques to improve existing vaccination/immunization and related immunodiagnostic methods. [The petitioner] is working on non-viral methods for (cancer) vaccine delivery and immunomonitoring of vaccine efficacy with a focus on the use of nanoparticles. . . . [The petitioner] was able to file invention disclosures and patent applications on potent nanoparticle based vaccine delivery platforms. The platform has the potential to become a revolutionary immunomonitory method that will dramatically expedite the way vaccines are evaluated.

The record supports [redacted] assertion that the petitioner's paper [redacted] has earned more than 100 citations. The petitioner was the first author of the paper in question (entitled [redacted]. The March 14, 2010 SCOPUS printout showed 123 citations of that article.

On January 19, 2011, the director issued a request for evidence (RFE), instructing the petitioner to submit further evidence to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*.[1] In response, counsel asserted that the petitioner's "publication record is immense, with **over 400 citations**" (counsel's emphasis), and claimed that the director had disregarded substantial evidence of the petitioner's international reputation in his field.

The petitioner submitted copies of older letters attesting to his involvement in the peer review process, and new letters intended to establish his reputation. [redacted] stated that, after he saw a conference presentation by the petitioner, "I approached [the petitioner] to apply his nanoparticle based vaccine platform in our laboratory. We recently have initiated a scientific collaboration to use his technology in our camelid model in order to generate monoclonal antibodies that will be used for essential immunological studies."

[redacted], stated:

> Many research laboratories (like ours) and pharmaceutical companies are desperately looking for ways to enhance the delivery of DNA vaccines or delivery of vaccines in general. [The petitioner] is among [the] few who have performed extremely important research focusing on solving this problem by nanoparticle platforms that escort DNA vaccines to lymph nodes of the host where they can do their job. He has novel targeted-nanoparticles that bind to DNA and home them into antigen presenting cells thereby increasing the efficacy of DNA vaccines dramatically. We have been

[1] In the same notice, the director also instructed the petitioner to submit evidence of exceptional ability in the sciences as described in the regulation at 8 C.F.R. § 204.5(k)(3)(ii). Because the director subsequently acknowledged that the petitioner readily qualifies for classification as a member of the professions holding an advanced degree, discussion of exceptional ability is moot. Both classifications fall under section 203(b)(2) of the Act. Detailed analysis of the exceptional ability regulations would not affect the ultimate outcome of the present decision.

> collaborating in making vaccines for Leishmaniasis, one of the world health concerns for which there is no vaccine available. We started collaborating more than a year ago and soon obtained very promising results. . . . His platform has shown similar unprecedented results when [it] was used in melanoma or breast cancer mouse models.

[redacted] stated that "the US Army has a strong interest" in some of the petitioner's vaccine projects, but the record contains no Army documentation or letter from any Army official to confirm this claim.

Many of these letters are from collaborators rather than independent witnesses. At the same time, the AAO cannot ignore that the letters show that researchers from around the world have actively sought out the petitioner as a collaborator. Like the petitioner's significant citation record, these letters strongly demonstrate that other researchers rely on the petitioner's work.

The director denied the petition on June 14, 2011. In the 15-page certified decision, the director quoted from several witness letters and stated that the letters "offer strong but general praise for [the petitioner's] research" and did not show that the petitioner is "primarily responsible for [his] collaborative research." The director asserted, without explanation, that the petitioner had not published enough articles to influence his "field on a broad scale." Regarding the citation of the petitioner's work, the director acknowledged that the petitioner had documented several hundred citations, but had shown only 57 of those citations to be independent.

The director noted the petitioner's submission of figures showing 107 citations of one article, entitled [redacted] The director did not count these citations, because "Scopus does not list [the petitioner] among its authors." The petitioner's initial submission, however, had included a copy of that article, which showed the petitioner as one of ten authors. The SCOPUS printouts tend to identify only the first five authors, with ellipses (...) to indicate that there are additional authors.

Likewise, the record, on its face, contradicts the director's finding that the witness letters fail to show that the petitioner is "primarily responsible" for his research. The petitioner is also the first author of many of his heavily-cited papers, including the most-cited article with 123 citations as of March 14, 2010.

The AAO acknowledges the director's concerns about self-citation, and agrees that self-citation is not evidence of wider influence. At the same time, the AAO must also acknowledge that, where the petitioner did identify individual citing articles, the great majority of the citations were independent. Furthermore, the record indirectly supports a finding that most of the citations of the petitioner's work are independent rather than self-citations. The director, in the denial notice, had asserted that the petitioner had only published 16 articles. Even if the petitioner cited every one of his articles in every other article (impossible because they were published over the course of more than a decade),

self-citation would account for no more than 15 citations in any one article. Nine of the petitioner's articles, however, show more than 15 citations each, including two with over a hundred citations each. It is numerically impossible for most of those citations to be self-citations.

The petitioner, in response to the certified denial, submits a list of articles (showing titles and authors) citing the petitioner's work. The petitioner did not identify the source of the list. Nevertheless, the record contains ample evidence to show heavy citation of many of the petitioner's published articles. The director gave no persuasive reason to minimize the citation figures.

Counsel, in response to the certified decision, asserts that the director did not give sufficient weight to the "very large number of citations of Petitioner's work by other scientists/researchers." The AAO agrees, and finds no support for the director's conclusion that the petitioner had shown only a "moderate" number of citations.

The AAO also agrees with counsel's argument that the director failed to consider the substance of many of the witness letters. It is true (and counsel did not contest) that letters themselves are not primary evidence of eligibility. Nevertheless, where (as here) such letters corroborate and amplify objective, documentary evidence of record, they serve a supporting function by clarifying the nature of the petitioner's contributions to particular projects.

The director was correct to note that many of the letters are quite general, but not all of the letters are that way. Many letters specify how the petitioner's work contributed to the witnesses' own projects and has drawn significant attention from the research community. The AAO agrees with counsel that the director discounted these letters, and other persuasive evidence, without adequate justification.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. A significant amount of unrebutted evidence testifies to the petitioner's ongoing impact and influence throughout his field. The director, in the notice of decision, did not cite any adverse factors that would outweigh the evidence of the petitioner's eligibility. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. On the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the AAO will withdraw the director's decision and approve the petition.

ORDER: The director's decision of June 14, 2011 is withdrawn. The petition is approved.